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No. 99-1379

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by the Board of Governors after careful consideration of their qualifications by its membership Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception have obtained general recognition through scholarly publication or other activi-

[1] Rule 37.6 statement: Counsel of record is the author of this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

ties as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 633 American and Canadian members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[2]

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials in the labor arbitration process.

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2 Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 18.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy has amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration, although it has continued to limit its membership to those accomplished in traditional grievance arbitration.

As a result of its study of the increasing use of arbitration agreements as a condition of employment the Board of Governors of the Academy adopted the following policy statement on May 21, 1997:

> The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights.

The decision of the Ninth Circuit in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (1999) that the Ninth Circuit adopted and reaffirmed per curiam in this case (and in No. 99-1378, *Circuit City Stores, Inc. v. Ahmed*) will have a major impact on the enforceability of such agreements and a large impact on the number of statutory claims that arbitrators, including members of the Academy, will be called upon to decide. The interest of the Academy is, therefore, obvious.

Both the petitioner and the respondent in this case have consented to a filing of this amicus brief.[3] Their letters have been filed with the clerk.

ARGUMENT

1. The Court should grant the petition in this case (and as well in No. 99-1378, *Circuit City Stores, Inc. v. Ahmed*) limited to the first question presented identically, if somewhat inaccurately,[4] in both cases. In both cases the Ninth Circuit adopted and relied on its decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (1999). That decision clearly conflicts with the decisions of other circuits that have decided the meaning of the commerce requirement in the exemption of workers' contracts from the Federal Arbitration Act. It is an issue that this Court expressly reserved in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and it is important. Since the 1991 decision of this court in *Gilmer*, the practice of requiring employees to agree, as a condition of employment, to arbitrate rather than sue on claims of violation of federal and state anti-discrimination statutes has become common. Although the number of employees who are compelled to so agree is unknowable, estimates have been made that from 8 to 10% of the entire workforce of the United States is covered by such agreements.[5] They are

[3] Consent was also requested in No. 99-1378 and granted by the petitioner. No response, however, has been received from the respondent in that case.

[4] The first question presented states that the Ninth Circuit held "that the Federal Arbitration Act does not apply to contracts of employment." More precisely the Ninth Circuit held that the FAA does not apply because of the exemption in Section 1 of contracts of employment of "workers" engaged in an industry affecting commerce. The limitation to "workers" is significant. See *Bernhardt v. Polygraphic Co.*, 218 F.2d 948 (a "superintendant" is not within the exemption) (2d Cir. 1955), *reversed on other grounds*, 350 U.S. 198 (1956).

[5] See the surveys reported in Stone, *Employment Arbitration Under the Federal Arbitration Act* in Employment Dispute Resolution and Worker Rights 57 (IRRA, 1989).

enforceable under the Federal Arbitration Act in every circuit but the Ninth. Allowing this conflict to remain unresolved would create an intolerable situation for both the petitioner in these cases and other employers.

2. The second question presented in both of these cases, however, has no such broad significance and is not worthy of review. The issue is peculiar to the petitioner's particular form of agreement and is, indeed, different in the two cases, as the petitions acknowledge. Review of the Ninth Circuit's decision as to the scope of the exemption in Section 1 of the Federal Arbitration Act is important because of the widespread adoption and attempts to enforce workers' agreements to arbitrate their statutory claims. On the other hand, the question of whether in the particular circumstance of each of these two cases the agreement with the employer to arbitrate should be deemed to be part of a contract of employment is an unimportant question specific to the facts of these two cases and as to which there is no conflict in the circuits. Nor is there any conflict with the decision of this court in *Gilmer*. The registration with the New York Stock Exchange, which this Court there held not to be a contract of employment, was just that, not a contract with the employer.

Respectfully submitted,

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